Supreme Court, U.S.
FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MEEKINS, INC.,
Petitioner,
vs.
LABORERS' HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' PENSION TRUST FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' VACATION TRUST FOR SOUTHERN CALIFORNIA; LABORERS' TRAINING AND RE-TRAINING TRUST FOR SOUTHERN CALIFORNIA; FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED

1. Whether oral modifications made by the employer and union should be effective to alter the express terms of a written collective bargaining agreement in an action brought by third party beneficiary trust funds to enforce the terms of that written agreement pursuant to the Employee Retirement Income Security Act §§ 502 and 515, 29 U.S.C. §§ 1132 and 1145 and § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

2. Whether an oral modification made by an employer and union, when coupled with partial compliance with the written terms of a pre-hire agreement under § 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(b), is sufficient to repudiate that agreement *ab initio*.

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OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit (Pet. App. B) was not officially reported. The October 30, 1987 Order of the United States District Court for the Central District of California granting judgment in favor of respondents, together with the findings of facts and conclusions of

law, filed on December 7, 1987 and entered on December 8, 1987 (Pet. App. A), were not officially reported.

JURISDICTION

Respondents accept Petitioner's statement of the Court's jurisdiction.

STATUTES INVOLVED

Respondents accept Petitioner's statement of the statutes involved.

STATEMENT

Petitioner, Meekins, Inc. ("Meekins") was signatory to various collective bargaining agreements with the Laborers' Union ("Union"). Pursuant to those agreements Meekins made monthly contributions to the Respondents, Laborers' Health and Welfare Fund for Southern California, Construction Laborers' Pension Trust for Southern California, Construction Laborers' Vacation Trust for Southern California, Laborers' Training and Re-Training Trust for Southern California, and Fund for Construction Industry Advancement ("Trust Funds"). The Trust Funds are multiemployer plans within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980.

Meekins entered into a series of collective bargaining agreements with the Union. The first of those agreements was signed on October 17, 1973 and was followed by agreements signed on December 12, 1974, March 29, 1978, August 18, 1980 and again on November 1, 1983.

These agreements bound Meekins to the terms of a Master Labor Agreement and various trust agreements which set forth the obligation to pay fringe benefit contributions to the Trust Funds on behalf of individuals who perform covered work.

Meekins fully complied with the fringe benefit contribution obligation created by the written agreements with respect to certain individuals. In 1984 the Trust Funds audited Meekins and discovered that during the period of November, 1983 through November, 1984 individuals, other than those previously reported, were employed and performed covered work, but neither the hours worked were reported to the Trust Funds nor were fringe benefit contributions paid thereon.

The District Court held that "oral modification of such an agreement is legally unavailing against the plaintiff funds. In sum, the selective compliance with the agreement which appears here is not sufficient to put the Union on notice of Defendant's intent that the agreement was terminated." (Pet. App. A, at A-2). Accordingly, judgment was entered in favor of the plaintiff trust funds as set forth in the findings and fact of conclusions of law (Pet. App. A, at A-7).

The Court of Appeals upheld the District Court's findings.

SUMMARY OF ARGUMENT

The District Court and Court of Appeals correctly held that oral representations made by a union, that the obligation to contribute fringe benefit contributions to third party beneficiary trust funds would not be enforced, constituted fraud in the inducement and were invalid and unenforceable. That holding recognizes the necessity of preserving the policy of § 302 of the Labor Management Relations Act (*LMRA*), 29 U.S.C. § 186, requiring trust fund contribution agreements between an employer and a union to be in writing in order to avoid corrupt and collusive practices to the potential detriment of the trust funds' beneficiaries.[1]

The District Court and Court of Appeals also correctly held that the oral representations made between Meekins and the Union were insufficient to repudiate the collective bargaining agreement. Meekins' conduct of partial contract compliance did not rise to the level of "activity overtly and completely inconsistent with contractual obligations" as required by *McNeff v. Todd*, 461 U.S. 260, 271 n.11 (1983).

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[1] *Kaiser Steel Corp. v. Mullins*, 555 U.S. 72 (1982) did not hold that third party beneficiary trust funds are subject to employer defenses based on oral modifications of written agreements. Rather, this Court held that trust funds are subject to defenses of contract illegality.

Likewise, *United Steel Workers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960) did not involve any issue as to oral modifications of written agreements. That decision upheld the availability of an arbitration clause in a collective bargaining agreement, reasoning that contract interpretation was better left to an arbitrator whose experience with contract negotiations could enable him to resolve contractual disputes.

REASONS FOR DENYING THE WRIT

1. THE NINTH CIRCUIT'S DECISION COMPORTS WITH THE PURPOSE AND POLICIES OF SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT AND IS NOT IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit has uniformally relied on § 302 of the *LMRA* in rejecting oral modifications of written agreements which require contributions to fringe benefit trust funds. For example, the court in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 775 n.3 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) citing *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981), later appeal, 767 F.2d 589 (9th Cir. 1985), *cert. denied*, 475 U.S. 1064 (1986) stated:

> We held that the express terms of the agreement were to be enforced in favor of the trust fund because oral modification of the employee benefit provisions was forbidden by § 302 of the Labor Management Relations Act, 29 U.S.C. § 186 *id.* at 1366. *See also Operating Engineers Pension Trust v. Giorgi*, No. 85-5823, slip op. at 6-8 (9th Cir. April 28, 1986).
>
> To inhibit corrupt practices between employers and unions, § 302(c)(5) requires that payments from an employer to an employee benefit trust fund be made pursuant to a detailed written agreement. *Maxwell v. Lucky Construction Co. Inc.*, 710 F.2d 1395, 1397-98 (9th Cir. 1983).

See also: *San Pedro Fishermens Welfare Trust Fund Local 33 v. DiBernardo*, 664 F.2d 1344 (9th Cir. 1982) and *Kemmis v. McGoldrick*, 706 F.2d 993 (9th Cir. 1983).

The Ninth Circuit follows the Third Circuit rule regarding oral modifications. In *Lewis v. Seanor*, 382 F.2d 437 (3rd Cir. 1967) the Court distinguished *Lewis v. Mears*, 297 F.2d 101 (3rd Cir. 1961), *cert. denied*, 369 U.S. 873 (1962). The Court in *Lewis v. Seanor* indicated that the *Mears* decision was limited to a situation where parol evidence could be used to show that a written agreement was never fully executed or delivered. The *Seanor* Court held that where there is a valid written agreement any oral understanding suspending or modifying that agreement is invalid under the policies enunciated through § 302(c)(5)(b) of the *LMRA*, *id.*, 443.

Petitioner's suggestion that this situation involves a conflict between §§ 301 and 302 of the *LMRA* based on a characterization of contracts as "real" or "pretensive," is misguided.

Petitioner relies primarily on *Lewis v. Lowry* ("*Lowry I*"), 295 F.2d 197 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962). *Lowry I* involved an appeal from the granting of a summary judgment motion in favor of the plaintiff trust funds. The employer argued that the district court improperly excluded evidence that the union had agreed not to enforce the obligation to the trust fund as set forth in the written agreement. *Lowry I* held that the court must consider evidence in order to characterize the alleged oral modification and written agreement as either "real" or "pretensive."

The Fourth Circuit in *Lewis v. Lowry* ("*Lowry II*"), 322 F.2d 453 (4th Cir. 1963) recognized that *Lowry I* only held that a court must consider evidence that a contractual transaction was, in fact, a sham, *id.*, 455-456. *Lowry II* upheld and reiterated the general rule that parol

evidence was not admissible to alter the written contract, *id.*, 455.

When viewed together, the *Lowry* cases are closely aligned with the "fraud in the inducement" and "fraud in the execution" analysis followed by the Court of Appeals in this action (Pet. App. 13, B-5 to B-9). *Lowry II* characterizes conduct in terms of whether or not the contract was a "sham" or "genuine." *Lowry II* specifically refers to the union agent's misrepresentation as fraud to induce the employer to sign the agreement contrasted with the employer's "no-contract" defense, *id.*, 456. Even the example given by *Lowry I* as to the "April's Fool" contract is a basic example of fraud in the execution.[2]

The Fourth Circuit in the *Lowry* cases was laboring with the problem of characterizing conduct. Ultimately, the resolution in *Lowry II* was to distinguish fraud in the execution from fraud in the inducement. The employer was allowed to present evidence that the agreement never became his contract and was only a "sham," but the Court finally held that such a "contention constituted but an impermissible variance and contradiction of the agreement . . ." *id.*, 322 F.2d at 454.

A fundamental difference exists between the *Lowry* cases and those decided by the Ninth Circuit. The Ninth Circuit has consistently rejected oral modifications based upon an analysis of § 302 of the *LMRA*. Whereas, the *Lowry* cases did not consider the effect of § 302 of the *LMRA* with respect to attempted oral modifications. *Lowry II*, *id.*, 322 F.2d at 456 in fact, concluded that:

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[2] In that example, the court indicated that a contract would not be enforceable where an employer signed a document believing it to represent the actual agreement between the parties, but where the union, as an April Fool's joke, substituted an entirely different and fraudulent document in its place.

> We need not consider whether an oral contract, such as Lowry has asserted, is permissible under the Labor Management Relations Act. (citations omitted). While these statutes do imply that a collective bargaining agreement should be, and require the establishment of a fund to be, in writing, we do not depend upon these provisions to find against the verbal contract now pleaded in defense by Lowry.

Two of the cases cited by Petitioner as supporting its position relate to the use of extrinsic evidence to interpret the meaning of contractual language. (Pet. Brief p. 15, n.6: *Warehousemen's Health and Welfare Fund v. IT Corp.*, 524 F.Supp. 96 (C.D. Cal. 1981); *Brickmasons Pension Trust v. K. Pullen Co.*, 99 Labor Cases, 10730 (CCH) (C.D. Cal. 1983)). Those cases involve issues of contractual interpretation not oral modifications of written agreements. Those Courts held that extrinsic evidence or evidence of past practices can be used to show the meaning of contractual provisions; a situation far different from a union and employer orally agreeing not to enforce certain portions of those agreements.[3]

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[3] In addition, other cases cited by the Petitioner to support the so called "doctrine" of *Lewis v. Lowry ("Lowry I")* are not applicable. *Lewis v. Owens*, 338 F.2d 740 (6th Cir. 1965) held that parol evidence was not admissible to alter the written provisions of a contract in the absence of a showing that the entire transaction was a sham. The court expressly declined to consider the ramifications of § 302 of the *LMRA* within the context of that action. *See also, Wilkes Barre v. Great Northern Press*, 522 F.Supp. 106, 109 (D.C. M.D. Penn 1981) holding that parol evidence was admissible to show that no contract came into existence.

Also, in *Foothandlers Local 425 v. Valmac Industries*, 528 F.2d 217 (8th Cir. 1975) a court was confronted with a situation wherein the employer, completely unknown to the union, substituted different contractual language than that agreed upon during negotiations. In that situation (amounting to fraud in the execution) the agreement was held to be unenforceable.

The availability of an oral modification defense to the employer is not enhanced (as Petitioner suggests) in light of damage, or lack thereof, to the individual beneficiary.[4] As observed in *Maxwell v. Lucky Construction Company*, 710 F.2d 1395, 1398 (9th Cir. 1983):

> Neither the lack of secrecy nor the fairness of the contested oral arrangement are, we believe, grounds on which to excuse the writing requirement of § 302(c)(5). The knowledge and participation of the affected employees are not adequate substitutes for the protection afforded by the writing requirement. Neither an individual employee nor an authorized bargaining representative may, therefore, waive the protections of § 302(c)(5) by accepting oral modification of the employer's written obligation to the trusts. *See J.I. Case Company v. NLRB*, 321 U.S. 332, 339 (1944) (suggesting that even where waiver is advantageous to an individual employee an individual agreement may be superceded by the protective requirements of the Federal Labor Acts).

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[4] The value of *Huge v. Long's Hauling Co. Inc.*, 590 F.2d 457 (3rd Cir. 1978) to Petitioner's argument is uncertain. Judge Adams, in his concurring opinion, specifically indicated that he would not allow any contractual defenses to be interposed against trust funds seeking to enforce the fringe benefit provisions of a written agreement. Judge Adams also distinguished *Lewis v. Lowry ("Lowry I")* since, in that action, the employer's defense was that no contract ever came into existence at all.

The expectation of employees, whether union or not, cannot be used as a viable standard by which to measure the application of *LMRA* § 302. To do so would invite an unworkable and chaotic fringe benefit fund environment. Moreover, Petitioner cannot rely on *Operating Engineers Trust Fund v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984) to support this position. In that case the employer raised the defense of fraud in the execution, that is, he was mislead as to the very nature of the document he executed. Under that situation, the § 302 analysis was not relevant since the written agreement never came into existence in the first instance.

2. THERE IS NO CONFLICT AS TO WHAT CONDUCT CONSTITUTES REPUDIATION OF A PRE-HIRE COLLECTIVE BARGAINING AGREEMENT

There is no tension or conflict between § 302(c)(5) of the *LMRA* and § 8(f) of the *NLRA*.

In essense, the District Court and the Ninth Circuit Court of Appeals recognized that conduct that is partly consistent with and only partly inconsistent with the obligations created by a written collective bargaining agreement is not sufficient to repudiate that agreement.

Although *McNeff v. Todd, supra* did not formulate a conclusive test by which to measure repudiation, this Court did indicate that "engaging in activity overtly and completely inconsistent with contractual obligations" *id.* p. 271, n.11 may be sufficient to accomplish that repudiation.

In every case cited by Petitioner, conduct triggering repudiation was total and unequivocably inconsistent with the obligations created by the written contract. In the instant case, (as to certain individuals) Petitioner

totally complied with various provisions of the written agreements. As observed in *Contractors Health and Welfare Plan v. Harkin Construction Equipment*, 733 F.2d 1321, 1326 (8th Cir. 1984) "a mere breach of contract will not suffice as to establish repudiation." There is no authority supporting Petitioner's position that partial compliance with (or partial breach of) a contract is sufficient to constitute repudiation.

Petitioner's argument that an oral modification between a union or an employer may constitute repudiation is similarly flawed. The requirement of *McNeff v. Todd, supra* requires conduct that is completely inconsistent with the obligations created by the written agreement. Assuming, *arguendo*, that the attempted oral modification was valid, that oral understanding admittedly called for Meekins to honor the written obligations requiring payment of fringe benefit contributions on behalf of, at least, certain employees. By any standard, Meekins' conduct was consistent with that written contractual obligation.

The Petitioner is also attempting to use the concept of repudiation to circumvent the prohibition against oral modifications of written agreements under § 302(c)(5) of the *LMRA*. It is illusory, at best, to simply rename conduct which constitutes an attempted oral modification, thereby validating an otherwise invalid and illegal act.

The Union and Meekins simply did not engage in conduct "completely inconsistent with contractual obligations." Their conduct can only logically be viewed as an attempt to limit the effect of the written agreement. Based on the attempted oral modification, Meekins signed several collective bargaining agreements and continued to partially abide by the written obligation. Accordingly, the District Court and the Ninth Circuit Court of Appeals correctly decided that the

Union and Meekins' attempted oral modification was simply insufficient to effect a repudiation under *McNeff v. Todd, supra.*[5]

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[5] The Ninth Circuit Court of Appeals concluded that since Meekins' conduct was insufficient to constitute a repudiation under *McNeff v. Todd, supra* it was unnecessary to determine the retroactive affect of *Mesa Verde Construction v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (*en banc*) wherein the court adopted the National Labor Relations Board's decision in *John Deklewa*, 282 NLRB 184 (1987), *enforced sub. nom. International Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 222 (1988). The *Deklewa* rule, as formulated by the National Labor Relations Board disallowed a unilateral repudiation in the absence of an election to accept or reject the union.

Petitioner's suggestion (Petition, pages 20 and 21 footnote 8) that this case supports repudiation under *Deklewa* is in error. *Deklewa* does not provide for repudiation by conduct whether at the inception or during the term of the pre-hire agreement. Moreover, there is no "trend" under § 8(f) to allow unilateral repudiation of pre-hire agreements as demonstrated by the National Labor Relations Board rule enunciated in the *Deklewa* decision and followed by *Mesa Verde Construction, id. See also, R. W. Granger & Sons Inc. v. Local 275*, 686 F.Supp. 22, 28 (D.C. D.Mass 1988) and *IBEW Local 613 v. Fowler Industries Inc.*, 691 F.Supp. 1431, 1436 (N.D. Ga 1988).

CONCLUSION

The Ninth Circuit's decision below represents neither a conflict or tension between federal labor statutes nor does it represent any real conflict between the circuits which have considered the invalidity of oral modifications of written agreements under § 302(c)(5) of the *LMRA*. The Ninth Circuit's decision is also consistent with *McNeff v. Todd, supra* and with every other Court of Appeals' decision that conduct necessary to effectuate a repudiation must be totally and overtly inconsistent with all the provisions of the written collective bargaining agreement. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK NELSON ADKINS, ESQ.

GALISKY & ADKINS

Attorneys for Respondents
Laborers' Health and Welfare Fund
For Southern California, *et al.*

No. 88-1880

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LABORERS' HEALTH AND WELFARE FUND
FOR SOUTHERN CALIFORNIA, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

DONALD A. JOHNSON, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On June 15, 1989, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

STANLEY E. TOBIN
HILL, FARRER & BURRILL
35th Floor
445 South Figueroa Street
Los Angeles, California 90071

That affiant makes this service, for FRANK NELSON ADKINS, Counsel of Record, GALISKY & ADKINS, Attorneys for Respondents herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson
DONALD A. JOHNSON

On June 15, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared DONALD A. JOHNSON known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsue Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore M. Wilden
Notary Public in and for
said county and state